

# United States Circuit Court of Appeals

For the Ninth Circuit

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No. 3941

FAIRBANKS, MORSE & COMPANY, A COR-  
PORATION,

PLAINTIFF IN ERROR

vs.

LEVI F. AUSTIN AND JAY R. AUSTIN,  
CO-PARTNERS DOING BUSINESS UNDER THE FIRM  
NAME AND STYLE OF AUSTIN BROTHERS;  
HELEN S. AUSTIN; AND NETTIE M. AUS-  
TIN, AS TRUSTEE, DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE EAST-  
ERN DISTRICT OF WASHINGTON, SOUTH-  
ERN DIVISION

HONORABLE FRANK H. RUDKIN, JUDGE

BRIEF OF PLAINTIFF  
IN ERROR

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J. D. CAMPBELL

OLD NATIONAL BANK BUILDING, SPOKANE, WASHINGTON

JOHN B. VAN DYKE      JOSIAH THOMAS

ATTORNEYS FOR PLAINTIFF IN ERROR

812 LOWMAN BUILDING, SEATTLE, WASHINGTON

FILED

JAN 29 1903

F. D. MONROE, CLERK



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## BRIEF OF PLAINTIFF IN ERROR

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## STATEMENT OF THE CASE

This action was brought by Austin Brothers, et al, the defendants in error, against Fairbanks Morse

& Co., the plaintiff in error, to recover damages, both general and special, for breach of contract of sale of pump and engine. In their complaint the defendants in error allege that they are the owners of a certain tract of land containing forty acres, and hold under a five-year lease, with re-leasing privileges, another tract of land, containing eighty acres, adjoining said tract of forty acres. This lease runs from October 27, 1917. All of said land, except a small portion thereof, is used for the raising of alfalfa; is situated in an arid country, and no crops can be raised thereon without irrigation.

On the 25th day of September, 1919, the defendants in error entered into a written contract with the plaintiff in error, whereby the plaintiff in error agreed to furnish and deliver to said defendants in error, a certain oil engine, of 25 h. p., and a certain 8-inch pump, together with pulleys, belts and other accessories, for the agreed price of \$2430.00, f. o. b. cars, Seattle, Washington, and to be shipped by plaintiff in error to defendants in error at Haven, Washington, via Milwaukee Railroad, so delivery could be made December 1, 1919.

This written contract is in the nature of a general proposal made by the plaintiff in error to the defend-

ants in error, dated September 25, 1919, and is signed for plaintiff in error by A .J. Powell, and was accepted in writing by defendants in error on September 25, 1919. It also was approved at Seattle, Washington, for said plaintiff in error, by C. R. Miller, its manager.

One of the paragraphs at the end of said proposal reads as follows:

“It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an executive officer or local manager of Fairbanks, Morse & Co., becomes a contract binding parties thereto.”

After alleging, in the first cause of action, the ownership of the said land, its character and the material parts of the written proposal, the defendants in error plead that the plaintiff in error failed to deliver said pump and engine to the defendants in error between the first day of December, 1919, and the 30th day of March, 1920, and the defendants in error, on or about said last named date, rescinded said proposal, and demanded the return of the \$200.00 advanced by them to plaintiff in error, together with such damages as they might suffer by

reason of its failure, neglect and refusal to fulfill said contract and obligation.

At the time of entering into said contract with plaintiff in error, the defendants in error state they had abandoned their existent system of irrigation, and, relying on the fulfillment of said contract by plaintiff in error, they had deprived themselves of other means of irrigating their land, except by the installation of a new system of pumping equipment.

By reason of defendants' failure to fulfill said contract by delivering said machinery to them as agreed in said contract, they had sustained damages, which they denominate in their first cause of action as general damages, in the sum of \$7,000.00. (Record, pp. 2-6.)

In the second cause of action, after alleging the ownership of the said land, its character, and the execution of the written contract, the defendants in error allege that in order to save their growing crops, they did, on or about the 30th day of March, 1920, succeed in securing the right to connect with a certain hydro-electric power system already installed on adjoining property, and to take power therefrom, and immediately constructed a transmission power line to their said land, and installed

thereon an electric motor and pumping system, and by this means were able to pump water to irrigate their lands and to save as much as possible the crops thereon, and to minimize the damage to their meadows by reason of lack of irrigation of same, until so late a stage in the season, caused by the failure of plaintiff in error to fulfill its contract.

Upon the second cause of action the defendants in error claim what they denominate as special damages, in the sum of \$1800.00.

After the service and filing of said complaint, the defendants in error, in response to the demand of the plaintiff in error for a bill of the particular items of the damages mentioned in the second cause of action of the complaint, and which constituted the special damages amounting to \$1800.00, submitted a bill of particulars, which is shown in the record on pages 19 and 20. In reality the items of damages set forth in said bill of particulars constitute general damages and not special damages, and were so treated by the litigants and the court on the trial.

In its answer and on the trial the plaintiff in error admitted the execution of the contract or written proposal between it and the defendants in error, and

also admitted that delivery of the pump and engine was not made on or before the 30th day of March, 1920. It also pleaded affirmatively in said answer the execution of said contract, its modification by agreement between plaintiff in error and defendants in error, so as to extend the time of delivery until plaintiff in error could ascertain when said delivery could be made, and the arbitrary cancellation and rescission of said contract by the defendants in error on the 30th day of March, 1920, the offer to furnish the defendants in error with a temporary unit, consisting of engine and pump on April 2, 1920, confirmed in writing thereafter on April 9, 1920, the refusal of said proposition by defendants in error, and the delivery of the pumping equipment mentioned in said proposal and acceptance on April 30, 1920, which delivery was refused by defendants in error, and that any damages sustained by the defendants in error was due to their failure to use ordinary endeavors to get another pumping equipment to meet their needs or to accept the several offers made by the plaintiff in error to furnish them with a temporary equipment to meet their needs, it being possible for them to procure engines and pumps in the state of Washington, and which plaintiff in error could have procured for them had they permitted it to do so.

The fourth and last affirmative defense of the plaintiff in error sets forth, that the damages claimed by defendants in error to be the result of the failure of the plaintiff in error to deliver the pumping equipment mentioned in the complaint, were not such damages as were within the contemplation of the parties at the time the contract was made, and were too remote and speculative to be considered.

About eight days before the case came on for trial the defendants in error served upon the plaintiff in error a motion for leave to amend their complaint, by adding to their first cause of action a new paragraph, denominated ten and one-half, reading as follows:

“X $\frac{1}{2}$

“That the said machinery contracted for as aforesaid, was purchased by the said plaintiffs to be used by them in pumping water from a newly constructed well on their said land, during the irrigation season of 1920, and subsequent years, to irrigate all of the land hereinbefore described, which was then under cultivation, the said well being supplied by a direct, continuous and abundant and sufficient flow of water from the Columbia River, to which it was

in close proximity, and the said plaintiffs, relying upon the fulfillment of said contract by defendants, had from the time of entering into said contract, and by reason thereof, abandoned and deprived themselves of all other means of irrigating said land; all of which facts were well known to defendant, their agents and servants, at the time said contract was made and at all times thereafter." (Rec. p. 49.)

They also moved for leave to amend said complaint by inserting immediately after the word "paid" in the fifteenth paragraph of said first cause of action, the following allegation:

"The said damages consisting, first, in the loss of 250 tons of alfalfa hay, of the value of \$5000.00 (Five Thousand Dollars), which would have grown and been harvested on said land in excess of the quantity of alfalfa that did grow and was harvested thereon, during the crop year of 1920, if said defendants had fulfilled their said contract, so that plaintiffs could have pumped water to irrigate said land at and during the time they were deprived of the means of pumping water, by reason of the failure of defendants to fulfill the said contract, but which alfalfa was lost to plaintiffs by reason of plaintiff not being able to pump any water to irrigate said land, for about six weeks or more after the time when said land should have begun to be irrigated, because of defendant's failure to furnish said machinery as agreed in said contract, or in time to enable plaintiffs to begin pumping water afore-

said in time to save the crop. And secondly, by the total destruction of the alfalfa plant, and the roots thereof, on seven acres of said land, and permanent injury to the alfalfa plant on thirty-five additional acres of said land, by reason of the deprivation of the means of pumping water, to properly irrigate said land, as aforesaid, because of the failure of defendant to fulfill said contract; the said last-mentioned injury to said forty-two acres of land causing plaintiffs additional damage in the sum of \$2000.00 (Two Thousand Dollars)." (Record, pp. 50 and 51.)

By these amendments the defendants in error changed their first cause of action from one for general damages to one for special damages, and the amendments were by the court allowed at the commencement of the trial, to which allowance the plaintiff in error took exception and the exception was allowed. (Record, pp. 55-58.)

Upon the trial Levi Austin, one of the defendants in error, testified as to the amount of their general damages caused by being compelled to put in a temporary pumping plant, and also as to special damages sustained by them by reason of loss of crops and permanent injury to the alfalfa land. All of the testimony as to the special damages for loss of crops and permanent injury to the alfalfa land went

in over the objection of plaintiff in error, because it claimed such damages were too remote, speculative and not within the minds or the contemplation of the parties at the time the contract was entered into, and no recovery could be had therefor. (Record, pp. 58-67.)

The testimony of Jay Austin, also one of the defendants in error, as to the amount of special damages, was admitted over the objection of the plaintiff in error (Record, pp. 72-73).

It will be observed that the written proposal of plaintiff in error to defendants in error to furnish the pumping plant was accepted for defendants in error by Levi F. Austin, who was the only one who testified in regard to the execution of said contract on the part of the defendants in error. We quote in full from the record his testimony on that point, with the objection of counsel for plaintiff in error, and the ruling of the court thereon.

“Mr. Powell, the traveling agent of the defendant, and Mr. Zane, the local agent at Hanford, came to our ranch relative to buying this pumping plant. Mr. Powell’s name appears on the contract, which is the first proposal we had. He was on or over our land prior to the execution of the contract, and I went over the problem of irrigation with him.

"Q. What was said to him relative to the purpose for which you wanted this plant?

"MR. THOMAS: We object to this testimony on the ground that the contract speaks for itself, and merges all prior contemporaneous agreements all merged in the written contract.

"THE COURT: My understanding is you can always show execution of the written contract and it is not to bar you proving that fact.

"Objection overruled, answer the question.

"A. Yes, we went into details of the plant, that it was not satisfactory for the acreage we had in then, and we wanted to put in more acreage and we went into details as to the different lifts and the amount of water required and he proposed this twenty-five horsepower outfit connected to an 8-inch pump would be exactly what we would want for this condition and the amount of water.

"Q. Did the agent go with you over this land at the time you had this conversation? A. Yes.

"Q. Did you, or did you not make known to the agent of the defendant the full purpose?

"MR. THOMAS: Objected to, as the question is leading.

"THE COURT: You can ask him what the agent said in regard to it.

“A. Yes, we told him our problem there for irrigation, and at this time the outfit we had there was not satisfactory, we were not getting enough water, and we told him that we must make a change of some kind and asked what he would recommend to fit our purpose and he proposed that we take at least a twenty-five horsepower engine and connect it to this 8-inch pump, and later on, if we cared to put in a larger pump, this twenty-five horsepower outfit would furnish the power. We told him at that time it would be necessary to have the outfit delivered in time, account of the water in the spring, well, he assured us if we would place our order at that time there would be no question about the delivery of the machinery.

“Q. Was anything said further by you as to the time necessary for the delivery?

“A. Nothing further, that would be delivered about the first of December.

“Q. Why was it to be delivered by the first of December?

“A. Well, he had to install the engine and machinery there, and it takes more or less time; we thought we would install that during the winter so in our busy season we would have it ready for irrigation next year.

“Q. Was anything said by the agent as to the time the land there should be irrigated there that season?

"THE COURT: What was said?

"A. We discussed that point and it was understood we were to begin irrigation about the first of April. In going into the contract for the machinery to be delivered the 8th of December it would give us plenty of time to have the outfit installed and begin pumping by the first of April, that was understood between us and the agent.

"Q. Did you fix any definite date on which you were to have this pumping plant in operation to irrigate your property for 1920? A. Yes.

"Q. What was the date fixed? A. April first."  
(Record, pp. 68-70.)

Eck Baughn, one of the witnesses for the defendant in error, who had been an electrical engineer for fifteen years and an irrigation engineer for eleven years, testified that he knew the lands owned by defendants in error, and had been over and across them at various times, and was familiar with the soil conditions of these lands. He said they were composed of what is known as Ephrata fine soil, mixed with gravel, with emphasis on the gravel. There is a difference in the amount of water necessary for such as that, and land situated in the Yakima Valley. Four times as much water as is needed in the Yakima Valley is needed

on the soil of the Austin place. On the pumping plant they figure the Yakima Valley twice what they have for gravity, and on the Columbia River they double up on that. (Record, p. 77.)

On cross-examination he further testified that up in the district where Austin Brothers' property is situated, four times the Yakima government allowance of water is required to irrigate properly, on account of the soil there. (Record, p. 78.)

Jay Austin, one of the defendants in error, testified that during the years 1916, 1917 and 1918 was the only year they got water from the well on the north side of the forty-acre tract prior to the first day of May. The usual time they began irrigation from that well was on the first of May. They did not have water in the well sufficient to irrigate before that time. That well just came in year by year, with the exception of the year 1918, along about the first of May every year. When water was put on there the 1st of May they raised three crops on the land. None of the hay was damaged during these years. If they had had the equipment installed by May 1st, 1920, they would have been able to raise the same amount of crops, practically, as were raised in 1917, 1918

and 1919 on that land by getting water on there the 1st of May. (Record, pp. 73-75.)

The testimony of C. R. Miller, local manager of plaintiff in error, at the Seattle office, was to the effect that after the equipment was ordered by defendants in error from plaintiff in error, the order was placed by telegraph with the factory, and an endeavor made to get delivery as quickly as possible. There was a shortage of raw material of every kind, and a shortage of labor, and every manufacturer was behind with deliveries at that time, and his company had great difficulty in procuring material and making these engines and pumps.

Mr. Powell, the salesman who sent in the proposal and acceptance signed by Levi F. Austin for the defendants in error, was not with the company at the time of the trial, and he did not know where he was. Powell did not at any time inform the company as to the conditions at the Austin place, where this pump was to be located. Levi Austin called at the place of business of plaintiff in error in the latter part of December, 1919, and wanted to know if the engine he had ordered was of the latest type, and some information about its con-

struction, and the witness personally showed him another engine exactly like it, and gave him the information he wanted. He looked at the engine, and was apparently satisfied with it. Nothing else was said by Mr. Austin at that time, other than he was interested in a larger sized engine, which he expected to buy the following year or late that sesason. Mr. McIntosh, of his firm, was looking after the details of this transaction. He knew Mr. Zane at Hanford. He is what they call a dealer, a Z Engine Dealer. He sells the small type Z engine, 1½, 3 and 6 h. p. sizes. He buys the engines outright from plaintiff in error, and re-sells them. That is about all there is to the transaction. The company makes arrangements with him whereby he can buy these engines at what they call dealer's prices. The 6 h. p. is the largest engine he buys from the company on these terms. Above the 6 h. p. the company sells directly throughout the country through salesmen.

In response to a question asked by counsel for plaintiff in error of this witness, counsel for defendants in error objected because it was not shown that the witness knew where the land is located, had ever been on it, or knew how long it would take to

deliver there, and conditions surrounding it. The witness thereafter testified that he had never been on the lands of the defendants in error, and knew nothing of the condition of the country. (Record, pp. 78-81.)

Mr. W. J. McIntosh, a witness for plaintiff in error, testified as to the efforts made by him to obtain a temporary pump and engine for defendants in error, until the permanent equipment was ready for delivery. In response to a question asked Mr. McIntosh by counsel for plaintiff in error, counsel for the defendants in error objected because he did not know anything about the nature of the country where the defendants in error resided, never had been there, and did not know the conditions as to the installation. (Record, pp. 81-82.)

At the conclusion of the trial the plaintiff in error moved the court to withdraw from the consideration of the jury the question of damages, if any, sustained by the defendants in error, on account of the loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground and for the reason that such damages were too remote, speculative, and not within the minds or

contemplation of the parties at the time the contract was entered into, and there could be no recovery therefor. (Record, pp. 91-92.)

In passing upon this motion the court made the following statement:

“THE COURT: I will deny the motion to withdraw the question of damages for loss of crops and permanent injury to the alfalfa from the consideration of the jury, but will compromise with you by submitting a special finding to the jury, asking how much, of any of the damages thus found or allowed is for loss of crops and for injury to the growing crops, and if they find against you, let them find for the amount of damages sustained by reason of loss of crops and injury to the growing crops. You can then file a motion for a judgment upon the verdict for general damages and the plaintiff can file a motion for judgment upon the verdict for general and special damages. *You are apparently prepared on this question and it comes as a surprise to the plaintiffs and they are not prepared on it and I have not had an opportunity to fully examine the authorities, but what authorities you have here would indicate that your motion should be granted.* The plaintiffs may have ten days in which to submit their authorities, and you may have ten days to reply. If upon examination of the authorities submitted, I find that the question of special damages for loss of crops and permanent injury to the alfalfa should not have been submitted to the jury, the verdict as to those

items can be set aside, if necessary, without granting a new trial. At the time you move for judgment on the verdict for general damages and the plaintiffs move for judgment on the verdict for general and special damages, *in the event a verdict is returned against you for both, feeling and believing as I do now, I will grant your motion.*" (Record, pp. 92-93.)

The plaintiff in error excepted to that portion of the court's ruling refusing to withdraw from the consideration of the jury the question of special damages for loss of crops and permanent injury to the alfalfa, and the court then proceeded to instruct the jury as follows:

"This is an action to recover damages for breach of a contract for the sale of a pumping plant. The execution of the contract is admitted, and it is also admitted there was a breach of the contract on the part of the defendant. In other words, the contract called for delivery of pumping plant on or before December 1, 1919, and it was admitted that it was not delivered or tendered until subsequent to March 30, 1920. The only questions before you, therefore, relate to the measure of damages. The items of damages claimed are four in number. The first item is for the return of the \$200.00 paid at the time of the execution of the contract. The second item claimed is the cost of the installation of a temporary plant to supply

water after breach of the contract set forth in the complaint. The third item is for loss of crops during 1920, and the fourth is for permanent injury to the alfalfa growing on the land. The first item of \$200.00, under the contract, plaintiffs, as a matter of course, are entitled to recover, with legal interest from the 30th day of March, 1920. Conceding that the contract was breached by the defendant as claimed, as said by the Supreme Court of the United States:

“ ‘Where a party entitled to the benefit of a contract can save himself from loss arising from breach of it at a trivial expense or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damage only as with reasonable endeavors and expense he could not have prevented.’

“In other words, if you find the contract was breached by the defendant, and I charge you it was so breached, it then became the duty of the plaintiffs to make reasonable exertion to mitigate the damages. If they have failed in this they cannot recover. If they did exercise reasonable care to avoid damages they are entitled to recover whatever damages they suffered in so doing. They are not entitled to recover the expense of installing their plant, however, because that is not the true measure of damages. They could not retain the plant and recover the entire cost of installation. The measure of damages is the difference between the actual value of the plant at the expiration of such time as

the plaintiffs should have installed the plant called for by the contract, or some other plant to serve the same purpose, and the cost and expense of installation. The third and fourth items relate to the loss of crops and injury to the crops, or land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of contract was the proximate cause of the loss or damage. The Supreme Court of the United States has defined proximate cause, as follows:

“ ‘It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as the oft cited case of the squib thrown in the market place. *Scott v. Sheppard*, (Squib case) 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation. Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new, independent, cause, intervening between the wrong and the injury? It is admitted that the rule is difficult of application, but it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong,

is the proximate cause of an injury, it must appear that the injury was natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances.'

"If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the cause of the resulting damages then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course to determine the net value you must make deductions for all expense incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, that the growing alfalfa was injured, and that such injury resulted directly or proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard.

"You, gentlemen of the jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict, you will carefully consider and compare all the testimony; you will observe the demeanor of the witnesses upon the stand, their interest in the result of your verdict, if any such interest is disclosed; their knowledge of the facts in relation to which they have

testified; their opportunity for hearing, seeing or knowing the facts; their bias or prejudice and all the facts and circumstances given in evidence or surrounding the witnesses at the trial. I further charge you, that if you find from the testimony that any witness has wilfully testified falsely to a material fact you may disregard the testimony of such witness entirely, except in so far as he is corroborated by other credible testimony, or by other known facts in the case.

“The burden of proof is upon the plaintiffs in this case to establish their claim by a preponderance of the testimony. A preponderance of the testimony does not necessarily mean the greater number of witnesses, but rather the convincing force of the testimony as against the testimony offered by the opposing party.

“Your verdict, of course, must be based on the evidence and not upon mere conjecture or guess work. *There is some question in this case whether the parties are entitled to recover for loss of crops, or injury to the crops, but that is a question of law for the consideration of the court*, and I have therefore submitted to you a general verdict in favor of plaintiffs, and also the following verdict, or finding:

“How much, if any of the damages thus found, or allowed, is for the loss of crops and for injury to the growing crops?”

To that part of the court's instructions to the jury relative to proximate cause not quoted from

the United States' decision, reading as follows:

"The third and fourth items relate to the loss of crops and injury to the crops or land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration. The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.'

"If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the value of the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course to determine the net value you must make deductions for all expenses incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, that the growing of alfalfa was injured, and that such injury resulted directly or approximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in this regard."

the plaintiff in error duly excepted, and its exception was allowed. (Record, pp. 93-98.)

The jury, after a short absence, returned to the court, with a verdict in favor of the defendants in error and against plaintiff in error for general and special damages in the sum of \$3,088.00; \$574 of said amount being general damages, and \$2,514.00 thereof being special damages, divided as follows:

Loss of hay-----\$1,674.00

Permanent injury to crops----- 840.00

The defendants in error thereafter moved for judgment on the verdict of the jury in their favor and against the plaintiff in error, in the sum of \$3,088.00, and the plaintiff in error moved for judgment on the verdict of the jury in favor of the defendants in error and against the plaintiff in error, for the sum of \$574.00, together with costs.

The motion of the defendants in error for judgment on the verdict of the jury was granted, and the motion on the part of the plaintiff in error for judgment on the verdict of the jury for general damages only, was denied. A judgment was thereafter entered on the verdict of the jury, to which judgment the plaintiff in error excepted and its exception was allowed. (Record, pp. 99, 107, 108.)

Upon the motion of the plaintiff in error for judgment on the verdict for general damages, and the motion of defendants in error for judgment on the verdict for general and special damages, briefs were presented to the court.

In its memorandum decision, the learned trial judge used the following language:

“I have carefully considered the exhaustive briefs submitted by the respective parties, and have examined the numerous authorities cited, as well as others, but any attempt to review the many apparently conflicting decisions would be of no avail. *Suffice it to say that while the case is perhaps on the border line, I am not prepared to declare as a matter of law that the jury was not warranted in finding that such damages were within the contemplation of the contracting parties at the time the contract was entered into and flowed directly and approximately from the breach complained of.*” (Record, pp. 104-105.)

Thereafter a petition for a new trial was served and filed by the plaintiff in error (Record, pp. 110-115), and on the 9th day of October, 1922, the said petition for a new trial was, by the court, denied, to which ruling the plaintiff in error duly excepted and its exception was allowed. (Record, pp. 116-117.)

This writ of error is prosecuted to this court for the purpose of reversing the judgment of the trial court to the extent of setting aside the special damages assessed against the plaintiff in error, and to enter a judgment only for the general damages in favor of the defendants in error and against the plaintiff in error.



## ASSIGNMENT OF ERRORS

### I

The District Court erred in allowing the plaintiffs to file the amendment to their complaint, to which the defendant excepted at the trial, and which exception was allowed.

### II

The District Court erred in admitting the testimony of Levi Austin, one of the plaintiffs, regarding his conversation with Mr. Powell, the agent of defendant, prior to the execution of the contract

upon which this suit is based, to the admission of which testimony the defendant excepted at the trial, and which exception was allowed.

### III

The District Court erred in admitting any testimony whatever regarding loss of crops, or permanent injury to the alfalfa, upon the land of plaintiffs, to which admission the defendant excepted at the trial, and which exception was allowed.

### IV

The District Court erred in refusing to withdraw from the consideration of the jury the question of damages, if any, sustained by plaintiffs on account of loss of crops during the year 1920, or permanent injury to the alfalfa, on the ground that such damages, if any, are too remote, speculative, and not within the minds or contemplation of the parties at the time the contract was entered into, to all of which defendant excepted at the trial and which exception was allowed by the court.

V

The District Court erred in using the following language in instructing the jury:

“The third and fourth items relate to the loss of crops and injury to the crops and land, and whether the plaintiffs are entitled to recover these items is a question of fact for your consideration: The plaintiffs are entitled to recover these items if you find from the testimony that the breach of the contract was the proximate cause of the loss or damage.

“If you find that the plaintiffs suffered damages by reason of the loss of crops or injury to crops, and that the breach of the contract was the proximate cause of the resulting damages, then the plaintiffs are entitled to recover the net loss which they sustained in that regard, that is, the difference between the alfalfa which they actually cut and harvested and the net value of what they would have harvested had the contract been fulfilled. Of course, to determine the net value, you must make deductions of all expenses incurred in growing and harvesting the crop. The other item is based on the same ground. If you find that the alfalfa land was injured, and the growing alfalfa injured, and that such injury resulted directly and proximately from the breach of this contract, you will allow such further sum as will fully compensate the plaintiffs in that regard.”

to which foregoing part of the court's instruction defendant excepted at the trial, and which exception was allowed.

## VI

The District Court erred in rendering judgment on the verdict of the jury in favor of the plaintiffs and against the defendant, for any sum in excess of five hundred seventy-four (\$574.00) dollars and costs, in that it was not shown by pleadings or testimony that the special damages allowed for loss of crop, or permanent injury to the alfalfa, were reasonably supposed to be within the contemplation of the plaintiffs or defendant at the time the contract was signed, or that said special damages were such as might naturally be expected to follow its violation, or that defendant knew the extent of plaintiffs' farming operations, and the number of acres of alfalfa they had under cultivation, the number of acres they had intended to plant, or the precise time of the year when water was needed upon lands in the locality of plaintiff's ranch, to all of which defendant excepted at the trial, and which exceptions were allowed.

## VII

The District Court erred in denying defendants' motion for a new trial.

WHEREFORE the defendant prays that the judgment entered herein for any sum in excess of \$574.00 and costs, be reversed, vacated, and set aside, and that the District Court be directed to enter judgment in favor of plaintiffs and against defendant for the sum of \$574.00 only, together with costs.



## ARGUMENT AND AUTHORITIES

The plaintiff in error concedes that defendants in error are entitled to the recovery of general damages in the sum of \$574.00, and the only question presented by the assignment of errors in this case is whether or not the defendants in error have made out a case entitling them to recover a judgment for special damages in addition to the general damages. The correct determination of this legal proposition is of vital importance to the plaintiff

in error as well as to all other people engaged in the manufacture and sale of machinery, as a decision of this court in this case will, to a large extent, govern future sales made by manufacturers and wholesalers of machinery in this district. If the plaintiff in error is in effect an insurer of profits which may be made by its customers, when, without negligence on its part it fails to make delivery of machinery at the time ordered, it, as well as other manufacturers will hesitate to contract to deliver machinery at a definite date, or if it does so will be obliged to charge an exorbitant price in order to reimburse itself for losses that it must suffer through the occasional breach of its contract to deliver. If such damages under such circumstances are allowed the result to business will be disastrous. The enormous damages that might ensue in the breach of the smallest contract may be so augmented that one would not be safe in doing any kind of business.

We respectfully submit that under the pleadings and the evidence in this case the defendants in error are not entitled to recover any special damages, because such special damages were not within the contemplation of the parties at the

time the contract was made and are too remote and speculative to be considered. The trial court erred in submitting the alleged special damages to the jury and should have granted the motion of the plaintiff in error to take such question away from the jury, and should have decided as a matter of law that there was no occasion for submitting such question to the jury. The evidence in this case is susceptible of only one reasonable inference and therefore a question for the court under all of the authorities; that is, the evidence as to the special damages claimed by defendants in error in their first cause of action.

When the motion was made by plaintiff in error to withdraw from the consideration of the jury the question of special damages, and the authorities in support of such motion were presented, the court believed that such motion should be granted, but because the defendants in error were not prepared to meet the issue with authorities the court reserved his decision until the hearing of the motion for judgment on the verdict of the jury. (Record, pp. 92, 93.)

In his instructions to the jury the trial judge used the following language, showing that he was not

satisfied that the question of special damages should be submitted to them :

“There is some question in this case whether the parties are entitled to recover for loss of crops, but that is a question of law for the consideration of the court, and I have therefore submitted to you a general verdict in favor of the plaintiffs, and also the following special verdict or finding.

“How much, if any, of the damages thus found or allowed is for the loss of crops and for injury to the growing crops?”

The plaintiff in error was justified in assuming that upon the hearing of the motions for judgment on the verdict of the jury, the submission of the question of special damages would be considered the same as if the jury had not brought in its verdict at all, that is to say, the question would be decided by the court without any regard to the fact that the jury had brought in a finding holding the plaintiff in error liable for the special damages. The trial court, however, while conceding that the case was on the border line, was not prepared to declare as a matter of law that the jury was not warranted in finding that such damages were within the contemplation of the contracting parties at the time the contract was entered into and flowed directly and approximately from the breach com-

plained of. We expected this question to be decided without regard to any finding of the jury. The question, as we understood it, was not as to whether the jury was warranted in finding that such special damages were within the contemplation of the parties at the time the contract was made, but were the facts in evidence sufficient in law to make out a case for the defendant in error upon the question of special damages justifying their submission to a jury. It is an oft quoted saying that "out of the facts the law arises," and we believe that we can probably be of more assistance to the court in this case in deciding the question involved if we cite the facts in adjudicated cases, and then apply the law of those cases thereto, in order to compare the facts and the law with those applicable in this case. There is no dearth of authority, both English, Canadian, State and Federal, upon this subject, and the only difficulty is to narrow them down and present only what might be termed "leading cases."

The general principles of law governing the recovery of special damages for breaches of contract, as enunciated in the text books and adjudicated cases, are not disputed by us. The difference, however, is to be found in the application of these

principles rather than in the principles themselves. As well said by Judge Deady, in *Hunt v. Oregon Railway Company*, 36 Fed. 481:

“The difference in this and like cases lies not in the ascertainment of the law of the subject, but the application thereof.” Citing 1 Sedgwick Damages, 65.

What the defendant in error seeks to do in this case, is to recover special damages arising, not directly and immediately by reason of the alleged breach of the written contract itself, but arising wholly and solely from matters which are entirely collateral to the contract.

The rule with respect to the recovery of damages for a breach of contract was stated so well in the case of *Hadley v. Baxendale*, 9 Ex. 341, that it has become a classic in the law. In that case, the plaintiffs, who were the owners of a flour mill, sent a broken shaft to the defendant, who was a common carrier, to be conveyed by him to a manufacturer of such machinery, the purpose being that the broken shaft might serve as a pattern for a new one. The defendant was informed that the mill was stopped and that the broken shaft must be delivered immediately. The delivery of the shaft was unreasonably delayed, in consequence of which the

plaintiffs did not receive a new shaft for some days after the time that it ought to have been received, and they were therefore unable to run their mill, thereby incurring loss of profits. The court, speaking through Baron Alderson, held that such damages could not be recovered, saying:

“Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

\* \* \*

“It follows, therefore, that the loss of profits here cannot reasonably be considered such a con-

sequence of the breach of contract, as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contracts, communicated to or known by the defendants."

It is to be noted that in the last named case, the carrier was informed that the mill was stopped, and that the broken shaft must be returned immediately, and for that reason the shipper claimed the carrier should be held to a knowledge that there might be a loss of profits resulting therefrom, and that the shipper would suffer loss so long as the mill was stopped. In the case at bar it is not alleged or proved that any of the special circumstances relating to the extent of Austin Brothers' farming operations; the number of acres of alfalfa they had under cultivation; the number of acres they had intended to plant, or the precise time of the year that water was needed upon the lands in the vicinity of their ranch, were called to the attention or were within the knowledge of the plaintiff in error, but only that the defendants in error were the owners of certain lands, and that they

had deprived themselves of the means of irrigating them except by the purchase of the pumping equipment from plaintiff in error, all of which facts they say in the amendment to their first cause of action, were well known to plaintiff in error at the time said contract was made and at all times thereafter. Many contingencies might happen which would prevent the anticipated profits, so the same cannot be said to be within the contemplation of the parties at the time the contract was made.

We submit that the information which Levi Austin, one of the defendants in error, communicated to the salesman of plaintiff in error, did not relate in any wise or at all to the subject matter of the contract, nor did it relate to any existing facts, circumstances or condition, even remotely connected with the contract.

In the case of *Pennypacker v. Jones*, 106 Pa. 237, the plaintiffs owned and operated a flour mill, and entered into a contract with the defendants, by the terms of which the defendants were to place in the mill within the time specified, machinery of a certain capacity to make flour of high grade. When the machinery was installed, it was found that it did not make a high grade of flour and was in-

capable of producing the number of barrels per day stipulated in the contract. The plaintiffs brought an action against the defendants for breach of contract, and claimed as damages their loss of possible profits which might have been made if the mill had run properly. The court held that the loss of possible profits was not a proper subject for damages, saying:

“It was no part of this contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual market value of the property sold represents directly and immediately the measure of the party's loss or gain in the transaction. There the possible profit is the very object of the contract and is necessarily in the contemplation of the parties. But when a machinist furnishes machinery to a mill owner it is no part of his agreement that a profitable business shall be carried on with the machinery furnished. Of course, if it is defective he is responsible for the damage resulting directly from such defect; but that is a very different thing from the uncertain, remote and speculative profits which may or may not be made in the business to be done.”

In speaking of damages as anticipated profits, Davies, J., in *Corbin v. Thompson*, 39 Can. S. C., 575, says:

“Such profits are only recoverable when they can be held to be what are called primary profits, such as would have occurred and grown out of the contract itself as the direct and immediate result of its fulfillment. Then they are part and parcel of the contract itself, and must have been in contemplation of the parties when the agreement was entered into. But if they are such as would have been realized from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as part of the damages occasioned by the breach of the contract in suit, unless indeed the defaulting contractor has expressly contracted to be bound for such consequences, or the special circumstances are such that he may be held to have impliedly contracted to be so bound.”

So in the case at bar, the sole and only obligation under the written contract or proposal, and the testimony, was the furnishing of a pumping equipment within the time specified; it was no part of the agreement that the defendants in error should make profits from their land, and especially so when it is considered that neither the land nor the

anticipated profits bore any relation whatever to the contract.

The two cases presented to the trial court and which almost persuaded him to take the question of special damages away from the jury, were:

*Stebbins v. Selig*. 257 Fed. 230, decided by the Circuit Court of Appeals for the Eighth Circuit, on April 7th, 1919, and *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171, decided June 1, 1903.

In *Stebbins v. Selig*, *supra*, the plaintiff sued defendant to recover damages for the breach of a written contract between them, whereby the defendant agreed to drill an irrigation well on plaintiff's farm and install a pump thereon within twenty days from date of contract. The complaint set out the contract, alleged the failure of defendant to perform, and that as a result thereof plaintiff was compelled to make a new contract for the same purpose at a difference in cost of \$675.00 over and above what the well and pump would have cost if defendant had performed his contract. The paragraph of the complaint alleging special damage is then set forth verbatim in the opinion of the court, and we respectfully call the court's attention to

the language used by the plaintiff in pleading the special damages. To the paragraph alleging special damage the defendant filed a demurrer upon the ground that it did not state a cause of action for the damages claimed in said paragraph. This demurrer was sustained by the trial court, and from this ruling a writ of error was prosecuted to the Circuit Court of Appeals. The Appellate Court affirmed the order of the lower court sustaining said demurrer. Every word used by the judge who wrote the opinion in this case fits the instant case. While the Stebbins case was determined upon the pleadings and not upon evidence, that can make no possible difference, as the defendants in error in this case have not in their pleadings and evidence combined made as strong a showing that they are entitled to recover special damages as was made by the pleadings alone in the cited case. In sustaining the lower court the court of review said:

“In considering the question of special damage we must remember that the contract between the parties was in writing and contained no expression as to what the damages should be in case either party wholly failed to perform it. The general rule is that a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at

the time of making the contract. Under this rule the plaintiff in the present case could clearly recover in the proper forum the sum of \$675.00, which he alleges was the excess paid to the Layne & Bowler Co. for doing the same work that the defendant agreed to do. Parties, when they make contracts, contemplate performance, not breach; therefore, they do not usually say anything about consequences in case of breach by either party. In this situation the law establishes a rule by which it may be determined with reasonable certainty what the parties would have said, had they spoken in their contract. Thus arises the rule, above stated, that parties who break their contracts are to be held responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. The rule being thus established, the next question that arises is: How shall it be determined what the consequences were which the parties to a contract contemplated when they entered into the same? It has been decided that these consequences may be shown by oral evidence when the contract is in writing. It has also been decided that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account, if he fails to deliver the goods. As was said by Mr. Justice Willes in *British Columbia Saw Mill Co v. Nettleship*, L. R. 3 C. P. 499, 508:

“The knowledge must be brought home to the party sought to be charged under such circum-

stances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.'

"In this case the special condition would be that defendant entered into the contract in question, knowing that the plaintiff reasonably believed that, if the defendant wholly failed to perform the contract, he would be liable to the plaintiff for the difference between the value of the rice crop raised upon plaintiff's land and the value of the rice crop raised upon any adjoining land; this difference in the present case is \$3,500.00. One way of testing whether the defendant contemplated this consequence is to suppose that, had defendant been asked to agree to a clause in the contract that would make him liable in the way specified, would he have assented to the same? In our judgment there can be but one answer to this question: He would not. The foregoing principles of law are fully illustrated and sustained by the Supreme Court of the United States in *Globe Refining Co. v. Landa Cotton Oil Co.*, *supra*, where the cases, English and American, are cited.

"This case in our opinion fully sustains the ruling of the trial court. While the complaint shows that the defendant was in the business of sinking wells for the irrigation of rice lands, and knew that the plaintiff wanted the water to be pumped from the well in question to be used for the growing of rice, there is no showing in our opinion, that the plaintiff believed or contemplated, or that it

was in the contemplation of either party, that if the defendant failed to perform the contract within 20 days he would be liable for the difference in value between the rice crop of the plaintiff and any rice crop raised upon any adjoining land. The authorities upon the question of damages for the breach of contract are innumerable, but in the view we take of the case we are controlled by the case last cited."

*Globe Refining Co. v. Landa Cotton Oil Co.*, cited and followed in *Stebbins v. Selig*, was also decided upon the pleadings, but we must not forget the allegations of the complaint taken as facts make a much stronger case for the plaintiff than the pleadings and the evidence in the present case, and still the court held the plaintiff could not recover special damages. The contract was in writing; the action was brought to recover special damages for breach of contract to deliver crude oil, as well as general damages. In passing upon the allegations of the complaint, and particularly that part following the allegations of special damage, viz., "all of which facts, as above stated, were well known to the defendant, and defendant had contracted to that end with plaintiff," the Supreme Court used the following language:

“Whatever may be the scope of the allegations which we have quoted it will be seen that none of the items were contemplated expressly by the words of the bargain. Those words are before us in writing, and go no further than to contemplate that when the deliveries were to take place the buyer’s tanks should be at the defendant’s mill. Under such circumstances the question is suggested how far the express terms of a writing admitted to be complete, can be enlarged by averment and oral evidence; and if they can be enlarged in that way, what averments are sufficient.” . . .

“The question arises, then: What is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422. See *Sawdon v. Andrew*, 30 L. T. N. S. 23. But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2d ed. 10, in *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. Q. B. 473, 478, ‘it may be asked, with great deference, whether the mere fact of such consequences, being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability,’ citing Mr. Justice Willes, in *British Columbia & V. I. Spar, Lumber & Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 500, in which he used the following language:

“‘I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. . . . If that (a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff’s trade should prove successful and without a rival) had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew, from the shippers, the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special conditions attached to it.’ ”

After quoting the last paragraph, the United States Supreme Court, by Justice Holmes, goes on to say, that the last words therein are quoted and reaffirmed by the same judge in *Horne v. Midland R. Co.*, L. R. 7 C. P. 583, 591; S. C. L. R. 8 C. P. 131. See also Benjamin, Sales, 6th Am. Ed. Sec.

872. It then proceeds to test the allegations of the complaint as follows:

“It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods. With that established we recur to the allegations. . . .

“The allegation is that the fact that the plaintiff had contracts over was well known to the defendant, and that ‘defendant had contracted to that end with the plaintiff.’ Whether, if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider. It is enough to say that it does not allege the conclusion of fact so definitely that it must be assumed to be true. With the contract before us it is in a high degree improbable that any such conclusion could have been made good.”

Counsel for plaintiff in error at all times objected to the introduction of any evidence as to special damages, because under the issues as framed it was not properly admissible, and all of such evidence went in over the objection of plaintiff in error. Defendants in error had in effect admitted that their first cause of action was not sufficient to sustain proof of special damages because it did not allege knowledge on the part of plaintiff in error that such

special damages would be sustained; but, at the eleventh hour, they were permitted to amend their first cause of action, over the objections of plaintiff in error. In this purported amendment, which was allowed to be filed by the court, they allege that plaintiff in error knew that the machinery was purchased for pumping water from a newly constructed well; that the well formerly used had been abandoned, and that the plaintiff had no other means of irrigation than by pumping from such new well. There is no allegation or evidence that the plaintiff knew how much land the defendants in error expected to irrigate, how much they had in alfalfa, whether such alfalfa was new alfalfa or old alfalfa, and no allegation by which it would be possible for plaintiff in error to compute how much, if any, defendants in error could or would be damaged by the breach of the contract to furnish the machinery in question. Take the amendment, paragraph 10½: It alleges that "the machinery contracted for was purchased to be used in pumping water from a newly constructed well on their land during the irrigation season of 1920 and subsequent years, to irrigate all the land hereinbefore described, which was then under cultivation, the said well being supplied by direct, continuous and abundant and

sufficient flow of water from the Columbia River to which it was in close proximity, and the said plaintiffs, relying upon the fulfillment of said contract by defendants, had from the time of entering into said contract, and by reason thereof, abandoned, and deprived themselves of all other means of irrigating said land, all of which said facts were well known to defendant, their agents, and servants at the time said contract was made and at all times thereafter.” Read the amendment and enlarge on it as far as one’s imagination will allow him to, and it is impossible to read into it an allegation that plaintiff knew that such land would take and require an unusual and extraordinary amount of water; that it was necessary to begin irrigating said land so much earlier than irrigation ordinarily commenced elsewhere, from which plaintiff in error could even remotely conjecture how badly defendants in error might be damaged by failing to get their water on their land at a certain fixed period. The testimony of Levi Austin, one of the defendants in error, goes no further than the allegations of the first cause of action and the amendment thereto allowed by the court. (Record, 68-70.)

In this connection it is interesting to note from the testimony of Jay Austin (Record, pp. 73-75),

that during the years 1916, 1917 and 1918, 1918 was the only year they got water on the land prior to May 1st. The usual time they got water to irrigate was on May 1st. The well did not come in prior to that time except during the year 1918. With water placed on the land by May 1st, they raised three crops. If they had the equipment installed by May 1st, 1920, they would have been able to raise the same amount of crops, practically as were raised in 1917, 1918 and 1919 on that land by getting water on there May 1st.

Mr. McIntosh, the engineer for plaintiff in error, informed the Austins the pumping machinery would be shipped on April 7th, and would reach the place of the defendants in error in about three weeks. He was told that would not be time enough, and the Austins were making arrangements for an electric plant. (Record, p. 82.) At and prior to the trial the defendants in error claimed that they had rescinded the contract on March 30th, 1920, and refused to have any further dealings with plaintiff in error. When the equipment was tendered on April 30th, the defendants in error refused to accept it.

One of the witnesses for the defendants in error, Eck Baughn, testified at the trial (Record, pp. 77, 78), that four times as much water was needed on the land of defendants in error as was required in the Yakima Valley; that is, four times the Yakima Government allowance of water is required to irrigate properly on the land of defendants in error on account of the soil conditions there. These conditions would certainly have been called to the attention of plaintiff in error at the time of making said contract if it was to be held liable for the loss of crops and permanent injury to the alfalfa land upon failure to deliver the pumping equipment at a fixed time. There is not a scintilla of evidence in this case on the part of defendants in error which goes to show that any special damages to be sustained by them for the breach of the contract, if it should be breached, was within the contemplation of either of the parties at the time it was entered into on September 25, 1919.

In the case of *Howard v. Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 35 L. Ed. 147, the seller brought suit to recover the balance of purchase price and the buyer counterclaimed for damages, both general and special. The trial court struck

out the defendant's plea which sought to recover profits expected to be derived from sale of flour which would have been manufactured, and excluded evidence offered in support of said claim, and its ruling was affirmed by the supreme court in a well reasoned opinion, citing a large number of cases, both State and Federal, and concluding with the following language:

“Tested by them, such losses were, in our opinion, rather remote and speculative rather than direct and immediate, resulting from the breach alleged. There was no stipulation in the contract that the defendants should make profits on flour from the wheat ground up by the machinery which the plaintiff contracted to furnish and erect in the mill. Nor were there any special circumstances attending the transaction from which an understanding between the parties could be inferred that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery, according to the terms of the contract.”

The defendants in this case were allowed to offset the general damages sustained by them as against the purchase price of machinery due to plaintiff, but the special damages were denied.

The case last cited and the case of *Globe Refining Co. v. Landa Cotton Oil Co.*, were followed in *E.*

*W. Bliss Co. v. Buffalo Tin Can Co.*, 131 Fed. 51. In this case the jury awarded the plaintiff judgment for special damages upon instructions of the court, which were duly excepted to by the defendant. Upon writ of error to the Circuit Court of Appeals, Second Circuit, this judgment was reversed, the court saying that the assignments of error based upon the exceptions to the rulings and instructions were well founded and hardly a debatable proposition. After reviewing the information which the seller had of the purpose for which the machinery sold was to be used by the buyer the court said:

“Under these circumstances, it cannot be said with any color of reason that the parties to the contract contemplated when it was made any liability of the defendant, in the event of a breach, beyond the usual consequences of the failure of a vendor to deliver property which he had agreed to sell.”

In *Hart-Parr Co. v. Barth Mfg. Co.*, 249 Fed. 629, delivery of metal patterns for use in casting farm tractor engines was unreasonably delayed, and the court held that, in the absence of prior notice of imminence of injury and consequential damage to seller by buyer, seller is not liable for

remote and inconsequential damages, by reason of use by buyer of wooden patterns during delay. The court also held unanimously that there was no error in the exclusion of evidence to prove such alleged loss and damage.

See also *Pusey & Jones Co. v. Combined Locks Paper Co.*, 255 Fed. 700, a well considered case decided by District Judge Geiger, of District Court of Wisconsin, and *Taber Lumber Co. v. O'Neal, et al.*, 160 Fed. 596, 602, from Circuit Court of Appeals, Eighth Circuit, both of which support the rule announced in the cases previously cited and discussed.

The last decision in the Federal Reports that we have been able to find dealing with the subject of lost profits constituting special damages is *Shelley v. Eccles*, 283 Fed. 361, No. 2 Advanced Sheets, dated November 30th, 1922. The cases cited by us are reviewed, discussed and distinguished in said decision. All this case holds is that the fourth amended complaint was sufficient to withstand the demurrer. A reading of said fourth amended complaint will show that its allegations were sufficient, as a pleading, to entitle the plaintiff to introduce evidence designed to hold the defendant liable for special damages, because he had been informed in

advance of the purposes and end the plaintiff intended to accomplish by the contract upon which the suit was based, and that it was understood at the time of contracting his profit would be due to the factory—an entirely different state of facts from the case now under consideration.

As to the proper rule for measuring damages in a case of this kind as laid down by our own State Supreme Court, we cite *Puget Sound Iron Works v. Clemmons*, 32 Wash. 36. In this case the lower court followed the advisory verdict of the jury in allowing special damages, but this judgment was reversed by the supreme court. The cause of action arose out of a breach of warranty of an engine. Upon the merits of the case the court said:

“There is no evidence at all in the record tending in any way to show that appellant knew the extent of defendant’s operations, the number of logs he was hauling, the number of men or machines he was working, or the kind or character of roads the logs were hauled over. These things would certainly have been mentioned at the time of the contract if plaintiff intended to give a warranty that the engine would do the work which defendant was going to put it to, and, in case of failure, to be liable for the loss of profits of a large logging company.”

Speaking of recovery of possible profits by reason of breach of contract of sale, the supreme court of Michigan, in *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, says:

“Very many questions similar to this might be put, and if the rule contended for by plaintiff in error were to prevail, in many cases the breach of a very simple contract, or failure in some part, might bring ruin upon the parties failing, where no such loss was contemplated. The adoption of such a rule would be extremely dangerous. If such consequences are to follow, it is much better that the parties, when contracting, expressly provide for such enlarged responsibility. This they may do, and the damages then may fairly and safely be said to have been contemplated by them at the time of entering into the agreement.

“Where the damages claimed, as in this case, largely exceed the contract price of the materials and labor to be furnished and performed by the party in default, we may well question the justice of such a conclusion in the absence of a clear showing that such a result was anticipated by the parties.”

In *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 275, 79 S. W. 1052, plaintiff brought suit against defendant to recover the sum of \$520.87 for material delivered for use in operating a com-

pressor. The plaintiff was informed that the material was needed by a certain date, and that unless received the compress could not run, and great loss would result to the defendant, and plaintiff thereupon agreed that it would ship the material by the date specified, which was September 1st. The material was not shipped until the 30th of that month, and when received did not fit, and for those reasons was worthless, and as a result thereof, defendant's compress was stopped for several months, and defendant claimed it was damaged in the sum of \$7,322.50, for which it asked judgment. Plaintiff was asking judgment for \$520.87. Judgment was entered against plaintiff in the sum of \$5,450.00 for the damages sustained by defendant.

After discussing one of the rules of damages announced in the case of *Hadley v. Baxendale*, the Supreme Court of Arkansas, took occasion to refer to the obvious injustice of such a rule especially when applied to cases where the recovery of damages is far in excess of the purchase price of the material sold under a contract, and its language is appropriate in the instant case. We quote as follows:

“If thereupon a blacksmith or machinist is called in, and for the price of a few dollars undertakes

to make the repairs, but through some mistake or unskilfulness, the part supplied by him should fail to fit, requiring it to be remade, and entailing still further delay, would any court hold that the blacksmith or machinist could be held liable for all the damages entailed by the delay, when they were large, in the absence of a contract on his part to be thus liable, unless the notice and the circumstances under which he made the contract were such that he ought reasonably to have known that in the event of his failure to perform his contract the other party would look to him to make good the loss? Theoretically, under the third rule as stated in *Hadley v. Baxendale*, the blacksmith, if he had notice, would be liable; but we know of no decision that has gone to that extent, but there are many cases in which such exorbitant claims for damages have been denied by the courts on the ground that it would be clearly unjust to allow them."

Later on in the course of its opinion, the court said, upon the question of special damages:

"Now, where the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability, had it been called to his attention at the making of the contract, unless the consideration to be paid was also raised so as to correspond in some respect to the liability

assumed. To make him liable for the special damages in such a case, there must not only be knowledge of the special circumstances, but such knowledge 'must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.' In other words, the facts and circumstances in proof must be such as to make it reasonable for the judge or jury trying the case to believe that the party at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part."

This language is followed by the citation of a number of cases, some of which have already been called to the attention of the court by us in this brief. The verdict of the jury allowing the recovery by the defendant of special damages was set aside because the instruction on the measure of damages was too general, and the damages assessed by the jury were clearly excessive, and it would be very unjust to allow such a large amount of damages to stand.

Many other cases which we might cite to the court lay down the same rule as is laid down in the Michigan and Arkansas cases. By no stretch of the imagination can it be reasonably contended in

this case that any such damages as are claimed by the defendant in error in their first cause of action, to-wit, \$7,000.00, were in the contemplation of the parties at the time the contract was made, or that plaintiff in error could fairly be supposed to assume such liability as is claimed here, to-wit, the payment of \$7,000.00 as claimed by defendants in error, in consideration of the sale of a pumping equipment for which it was to receive \$2,430.00, in long drawn out payments, out of which the cost of manufacturing, handling, and freight, etc., were to be deducted, or the payment of \$3,088.00 according to the judgment of the court in this case. For the general damages amounting to \$574.00 plaintiff in error has at all times admitted its liability, but for more than that sum, it contends most emphatically it should not be held liable.

The proper way of testing whether the plaintiff in error contemplated the consequences claimed in this case, is to suppose that, had it been asked to agree to a clause in the contract that would make it liable in the way specified, would it have assented to the same? Let us assume that Levi Austin, one of the defendants in error, who made the contract in the case at bar, with Mr. Powell, salesman of

plaintiff in error, as is set forth in the testimony, informed said Powell that he and his brother owned the land described in the complaint, and expected to make a certain profit from the crops thereon during the following year, and on that account he desired that the plaintiff in error should insert a clause in the contract, assenting to its liability for any damages sustained by reason of non-delivery within the time specified, can it be for one moment contended that the plaintiff in error would have consented to the inserting of such a clause? We say "NO," especially in view of the fact that the land and the expected profits from crops raised thereon were not in any wise related to any of the matters concerning which the parties contracted. There is no reason for supposing that the plaintiff in error would ever have assented to the insertion of such a clause in the contract.

We especially invite the court's attention to the case of *British Columbia Saw Mill Co. v. Nettleship*, which is cited in *Stebbins v. Selig, supra*, and *Globe Refining Co. v. Landa Cotton Oil Co., supra*. In that case the plaintiffs delivered at Glasgow to the defendant several cases containing machinery for shipment on board the defendant's vessel, which machin-

ery was intended for the erection of a sawmill at Vancouver Island. The defendant knew of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases which contained machinery, without which the mill could not be erected, could not be found, and the plaintiffs were obliged to send to England to replace the lost articles. The court held that the measure of damages was the cost of replacing the articles in Vancouver Island, plus 5 per cent upon the amount until judgment, by way of compensation for the delay, but refused to allow as damages any loss of profits from the operation of the mill which plaintiffs intended to erect. The opinions of Chief Justice Bovill and Justice Willes relate chiefly to the effect of knowledge on the part of the carrier of the use for which the machinery was intended. Justice Willes, in addition to what was quoted in *Stebbins v. Selig, supra*, said on this subject:

“He did not know that the part which was lost could not be replaced without sending to England. And, applying what I have before suggested, if he did know this, he did not know it under such circumstances as could reasonably lead to the conclusion that it was contemplated at the time of the contract that he should be liable for all those consequences in the event of a breach. Knowledge on the

part of a carrier is only important if it forms part of the contract."

Justice Willes then puts this case:

"Take the case of a barrister on his way to practice at the Calcutta bar, where he may have a large number of briefs awaiting him; through the default of the Peninsular & Oriental Company he is detained in Egypt or in the Suez boat, and consequently sustained great loss; is the company to be responsible for that, because they happened to know the purpose for which the traveller was going?"

From the authorities submitted, we believe we are justified in saying that a vendor will not be liable to the vendee for special damages consisting of the loss of profits in every case, where it appears that the goods were purchased for a particular purpose, and that the vendor knew that purpose. To create such extraordinary liability, and extraordinary it is, there must, in every case, be something in the terms of the contract, read in the light of the surrounding circumstances, which shows a plain intention on the part of the vendor to assume an enlarged engagement—a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of goods. No such intention has been shown in this case, hence the defendants

in error should not be allowed to prevail on their first cause of action for special damages, and they should be forced to be content with the general damages which they proved and were allowed under their second cause of action. We do not agree with the trial judge in this case that the decisions upon the subject are apparently conflicting, which led him to conclude that it is a case on the border line. In every case where special damages have been allowed, special circumstances have been shown justifying their recovery. No such special circumstances have been shown in this case.

We have made a very careful investigation of the authorities, both state and federal, and believe that there is but one case in the state court, viz., *Harrington v. Blohm* (Ark.), 206 S. W. 316, which the Federal Court cites and refuses to follow in *Stebbins v. Selig, supra*, that would support the contention of defendants in error that the damages for the loss of crops are such damages as can be collected for a breach of a contract to furnish machinery to pump water to irrigate land, the crop having been damaged by lack of water. As stated by the writer of the opinion in *Stebbins v. Selig, Harrington v. Blohm* is not a parallel case. A reading of the last named case will readily show that proof

of the knowledge of the defendant of the extent of the damages which might be sustained was very strong, which is not true in the instant case. The same thing is true of the defendant in the *Stebbins v. Selig* case, and still the Circuit Court of Appeals held the defendant was not liable for special damages—only for general damages. This is the extent of the relief of defendant in error in the present case if adjudicated cases are of any value as precedents, and we believe they are. We are not contending that the defendants in error are not entitled to damages, but that they should be limited to general damages according to their testimony, and no recovery should be allowed them for special damages. The courts hesitate to allow damages for loss of crops in cases of this character as there are so many elements that enter into those brought for that purpose. They have allowed damages in the following cases:

1. Where the loss was due to lack of seed, as that is a natural consequence and in the contemplation of the parties when defective seed is sold.
2. For defective fertilizer where the poor quality of the fertilizer was the sole reason for the loss of the crop.

3. For ineffective chemicals used to destroy insectiverous life where the insects were the sole cause of the loss of the crop.

4. In irrigation cases where the contract was to furnish a certain amount of water and the contract was breached by furnishing a less amount or none at all, where other lands in the same locality of the same kind received sufficient water to mature a crop, but the courts made a distinction between contracts to furnish water and contracts to furnish machinery to pump water with.

We could cite a line of decisions to the court where a tractor was wrongfully taken resulting in loss of crop; where a mule was wrongfully taken and as a result the crop was lost; where an ox was wrongfully taken and as a result the man lost his crop; where slaves were wrongfully attached and the crop failed; where a team of horses was sold for the express purpose of putting in a crop, warranted to be sound and fit to put the crop in, whereas they were unsound and diseased, and only half a crop was put in, and damages were claimed for the crop that was lost, in all of which cases the court refused to allow special damages, but we feel that we have sufficiently sustained our position in

this matter that further argument or citation of authorities is wholly unnecessary.

*Cannon v. Oregon Moline Plow Co.*, 115 Wash. 273.

*Wiggins v. Jackson*, 43 L. N. S. 153 and note.

The English, Canadian, Federal and State decisions uniformly hold that recovery cannot be had for loss of crops unless it can be clearly shown that the seller was duly advised of the consequences of a breach of his contract, and with such understanding accepted the consequences, but defendants in error have not brought themselves within this rule.

We feel confident that this court will follow the wholesome rule laid down in *Globe Refining Co. v. Landa Cotton Oil Co.*, *supra*, *Stebbins v. Selig*, *supra*, and the other cases cited and discussed by us, and direct a judgment against plaintiff in error for \$574.00, and for no other or greater amount.

Respectfully submitted,

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